Supreme Court, U.S.
FILED
SEP 9 1998
CLERK

(2)

No. 98-98

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR
ARIZONA DEPARTMENT OF CORRECTIONS AND
GRANT WOODS, ARIZONA ATTORNEY GENERAL,

Petitioners,

vs.

BERNARD SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION

JENNINGS, STROUSS & SALMON, P.L.C.

JAMES M. ACKERMAN
Counsel of Record

DAVID B. EARL
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2393
(602) 262-5982
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

CAPITAL CASE

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit properly applied well-established legal principles in this case. It reached the unremarkable conclusion that Respondent (Smith) was prejudiced when his trial counsel failed to present **any** mitigating evidence at his capital sentencing hearing. The Court of Appeals correctly accorded no presumption of correctness to the state court's ruling on the "prejudice" issue because that issue is a mixed question of law and fact (the application of law to the historical facts). Finally, it analyzed the prejudice issue under the correct standard – whether there is a "reasonable probability" that trial counsel's unprofessional errors affected the outcome – and reached the correct result.

The issues for review are:

1. Was the state judge's mixed finding of law and fact on the "prejudice" issue entitled to a presumption of correctness?

2. Did the Ninth Circuit apply the correct standard in considering whether there was a "reasonable probability" that trial counsel's failure to present any mitigating evidence affected the sentence?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

RESTATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. THE STATE COURT'S FINDING OF NO "PREJUDICE" WAS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS 2

A. A Finding Of "Prejudice" Under Strickland Is A Mixed Question Of Law And Fact Which Carries No Presumption of Correctness 2

B. In Any Event, The State Court Applied An Incorrect Legal Standard In Addressing the "Prejudice" Issue 4

II. THE COURT OF APPEALS APPLIED THE PROPER *STRICKLAND* STANDARD FOR FINDING PREJUDICE 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995) 10

Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995) 8

Clozza v. Murray, 913 F.2d 1092 (4th Cir. 1990) 10

Eddmonds v. Peters, 93 F.3d 1307 (7th Cir. 1996)..... 9

Flamer v. State of Delaware, 68 F.3d 710 (3rd Cir. 1995)..... 9

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982)..... 5

Kenney v. Tamayo-Reeves, 504 U.S. 1 (1992)..... 3

Lockett v. Ohio, 438 U.S. 586 (1978)..... 6

Pullman-Standard v. Swint, 456 U.S. 273 (1982)..... 3

State v. Gallegos, 178 Ariz. 1, 870 P.2d 1097 (1994) ...6, 9

State v. Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) 9

State v. Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) 6

Strickland v. Washington, 466 U.S. 668 (1984)..... *passim*

Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457 (1995)..... 3

Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963) 3

United States v. Singer Manufacturing Co., 374 U.S. 174 (1963)..... 5

United States v. Span, 75 F.3d 1383 (9th Cir. 1996) 8

Woratzeck v. Stewart, 97 F.3d 329 (9th Cir. 1996) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES/RULES

28 U.S.C. § 2254 ..... 2, 3

A.R.S. § 13-703 ..... 1, 5, 6, 7

Rule 52, Federal Rules of Civil Procedure 3

RESTATEMENT OF THE CASE

The Statement of the Case by Petitioners (jointly the "State") omits a few key points.

Under Arizona law, a sentence of death is mandatory for first degree murder if there are any statutory aggravating factors present and no mitigating factors. Ariz. Rev. Stat. § 13-703(E). In this case, the State had alleged several aggravating factors and it was therefore critical for Smith's trial counsel to offer some mitigating evidence to be weighed at sentencing. Trial counsel, however, called no witnesses, offered no mitigating evidence and made no argument at the capital sentencing hearing. *See* Appendix E to Petition for Writ of Certiorari (hereinafter "State's Appendix"). As required by Arizona law, the trial judge found no mitigating factors and imposed the death penalty without the individualized weighing that is the primary requirement of a constitutional capital sentencing scheme.

In the state post-conviction proceedings, Smith showed that trial counsel failed to present readily available evidence that would have supported **nine** recognized mitigating factors. State's Appendix B. Five of those mitigating factors were established by uncontradicted evidence. *Id.* Indeed, the State's own expert witness supported Smith's claims of a change in personality following an overdose of PCP and development of a personality disorder which affected his behavior.

REASONS FOR DENYING THE PETITION

I.

THE STATE COURT'S FINDING OF NO "PREJUDICE" WAS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

The State's argument regarding a "presumption of correctness" fails for two reasons: (1) the finding of no prejudice is a mixed question of law and fact which is not entitled to a presumption of correctness; and/or (2) in any event, the state court applied an incorrect legal standard in its "prejudice" analysis by disregarding mitigating evidence on the grounds that the defendant could still "conform his conduct as required by law."

A. A Finding Of "Prejudice" Under Strickland Is A Mixed Question Of Law And Fact Which Carries No Presumption of Correctness.

The State argues that the conclusion that Smith's sentence would have been the same even if the mitigating evidence had been presented was a finding of "fact" entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Petition at 5-9. The State cites no direct authority for this proposition because it is not the law. This Court held in *Strickland* that the issue of "prejudice" is a mixed question of law and fact which must be reviewed independently. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

The State concedes that *Strickland* held that an ineffective assistance of counsel claim is a mixed question of law and fact. Petition at 9. Nevertheless, it argues that the trial judge's "conclusion that this sentence would have

been the same was a factual finding independent of the decision of whether Smith's lawyer was ineffective and therefore entitled to the presumption of correctness." Petition at 9. The State overlooks the fact that finding prejudice, as defined by *Strickland*, consists of finding "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. For that reason, this Court expressly held: "although district court findings are subject to the clearly erroneous standard of Rule 52, Federal Rules of Civil Procedure, **both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.**" *Id.* at 698 (emphasis added). The State's theory is refuted by the very case it cites.

Even if *Strickland* had not already resolved this issue (which it has), the State's theory is contrary to decades of precedent. A mixed question of law and fact exists when a rule of law must be applied to the historical facts – as in deciding whether the facts satisfy the relevant statutory or constitutional standard. *See Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) ("So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense"), *overruled on other grounds by Kenney v. Tamayo-Reeves*, 504 U.S. 1 (1992); *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 464 (1995) (reaffirming the *Townsend* Court's definition of factual and mixed issues in relation to § 2254(d) presumption of correctness); *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The State admits this general rule. Petition at 5.

It is precisely this application of law to the historical facts that occurs in addressing the *Strickland* prejudice issue of whether mitigating evidence might have resulted in a different sentence under applicable law. For example, the question whether Smith suffered from a psychological disorder was a question of historical fact. The trial court's finding that Smith suffered from a psychological disorder was entitled to a presumption of correctness. Whether that psychological disorder should be considered a statutory or non-statutory mitigating circumstance, however, is a mixed question of law and fact because it requires application of law to the established facts.

The Court of Appeals did not disturb any of the trial judge's findings of historical fact. Rather, applying the law to those facts, the court concluded that the trial judge erred in not giving proper consideration to the non-statutory mitigating circumstances as required by law. The Court of Appeals was correct in refusing to accord a presumption of correctness to the state court's mixed legal and factual ruling.

B. In Any Event, The State Court Applied An Incorrect Legal Standard In Addressing The "Prejudice" Issue.

Even if the state court's determination of the prejudice issue were considered a factual finding, it still would not be entitled to a presumption of correctness because the state court applied an incorrect legal standard in making its ruling. "[I]f the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly

erroneous standard." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982). *Accord, United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963).

The state court committed legal error by considering only whether the evidence constituted mitigation as defined by Arizona's sentencing statute. That statute lists certain statutory mitigating factors, including that the defendants' "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1).

The state court concluded that the available mitigating factors would not meet the requirements of this statute:

> While there is evidence from the Petitioner of his extensive use of drugs, there is no evidence that he was either (a) under the influence of drugs, or (b) that his use of drugs **affected his ability to distinguish right from wrong**, or (c) **that his use of drugs diminished his ability to conform his conduct as required by law**, at any relevant moment . . . However, if all of the information brought forth in the hearings here had been brought out at the mitigation hearing, a preponderance of the evidence would not show childhood, parental abuse, mental infirmity or **inability to understand the quality or nature of his acts or to act in conformity with the law.**

State's Appendix C at 1, 3 (emphasis added). Thus, the state court dismissed the mitigating evidence on the basis that it would not meet this statutory standard.

Both federal and Arizona courts, however, hold that mitigating evidence must still be considered even if it does not rise to the statutory level of impairing one's ability to conform one's conduct to the law. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *State v. Thornton*, 187 Ariz. 325, 334-35, 929 P.2d 676, 685-86 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1706 (1997). The Arizona Supreme Court instructs its sentencing judges:

> Even if such evidence does not meet the relevant statutory standard set forth in A.R.S. § 13-703(G), we have maintained that in order to remain faithful to *Lockett* and *Watson*, the court's inquiry may not end there. The court must consider the offered evidence further to determine whether it in some other way suggests that the defendant should be treated with leniency. In short, the trial judge must determine whether the offered evidence constitutes a **non-statutory** mitigating circumstance.

State v. Gallegos, 178 Ariz. 1, 22, 870 P.2d 1097, 1118 (1994), *cert. denied*, 513 U.S. 934 (1994) (emphasis added).

The Ninth Circuit correctly held that the state court (and the district judge) erred in dismissing the mitigating evidence on the restricted basis of the statutory test:

> We pause to mention that the issue regarding Smith's antisocial personality and his long term use of drugs is not whether those precluded him from knowing right from wrong, as the post

> sentencing court and the district court seem to have assumed. They would have to come up to that level to meet a statutorily listed mitigating circumstance. *See* Ariz. Rev. Stat. § 13-703(G)(1). They need not do so in order to be non-listed mitigators.

State's Appendix A at 11.

Even if the trial judge's finding that Smith's sentence would not have changed could be considered a purely "factual" finding, therefore, the presumption of correctness would still not apply because the state court applied an incorrect legal standard for reaching that conclusion. For both these reasons, the Ninth Circuit acted properly in refusing to give the "prejudice" ruling a presumption of correctness.

II.

THE COURT OF APPEALS APPLIED THE PROPER *STRICKLAND* STANDARD FOR FINDING PREJUDICE.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court identified two components to an ineffective assistance of counsel claim: (1) deficient performance, and (2) prejudice. This test requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 699.

The State argues that the Court of Appeals failed to follow *Strickland* in its determination of "prejudice." Specifically, the State advances the novel theory that "prejudice" in sentencing can only be found where the Court of Appeals concludes that proper representation would **certainly** have resulted in a different sentence.

Petition at 10. Petitioners then argue that a lack of certainty is shown by the Court of Appeals' statements: "We do not say that any of the above considerations (non-offered or developed mitigation) were so powerful that they must have led to a life sentence rather than to a sentence of death" and "we recognize that these factors, even as now developed, do not demand a life sentence rather than a sentence of death." *See* Petition at 10. These statements, according to the State, show that there was no prejudice because the Court of Appeals is not certain the omitted evidence would have affected the outcome. *Id.*

The State's view of the law is profoundly mistaken. *Strickland* does **not** hold that prejudice exists only where errors certainly affected the outcome. On the contrary *Strickland* expressly requires that the defendant must establish only a "**reasonable probability** that, but for counsel's unprofessional errors the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). This well-established standard was properly followed by the Court of Appeals in this case. State's Appendix A at 7, (citing *Strickland*, 466 U.S. 668, 694; *United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996); *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995)).

Applying this standard, the Court of Appeals found there was a "reasonable probability" that the result of Smith's sentencing would have been different but for counsel's unprofessional errors. Those errors were therefore enough to "undermine confidence in the outcome." As the court noted, a "sociopathic personality defect" and "major personality change" are recognized non-statutory mitigating factors in Arizona. *See* State's Appendix A at

11 (citing *State v. Gallegos*, 178 Ariz. 1, 17, 870 P.2d 1097, 1113 (1994), *cert. denied*, 513 U.S. 934 and *State v. Rockwell*, 161 Ariz. 5, 15-16, 775 P.2d 1069, 1079-80 (1989)). Although the court found evidence of the lack of pre-planned intent to kill and good family relationships to be less compelling, the court recognized that competent advocacy could have used even these factors to paint a different picture of the defendant to the sentencing judge. *Id.* The Court of Appeals properly applied the standard of *Strickland*.

The State's argument to the contrary is based on nothing more than misleading partial quotations taken out of context. The State cites numerous cases as purportedly requiring a strict showing that a sentence **actually would have** been less severe but for counsel's deficient performance. Petition at 11-12. Actually, all of the cited cases applied the well-established "reasonable probability" standard set forth in *Strickland*; none purported to overrule that landmark decision. *See e.g., Woratzeck v. Stewart*, 97 F.3d 329, 336 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2427 (1997) ("We hold that even if Woratzeck's lawyer had contacted additional family members, there is not a **reasonable probability** that Woratzeck would have received a life sentence"); *Eddmonds v. Peters*, 93 F.3d 1307, 1321, (7th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1441 (1997) ("It is **very unlikely** that inconclusive evidence of mental or emotional disturbance would have overcome this undisputable evidence that Eddmonds is a vicious and rampant sexual predator"); *Flamer v. State of Delaware*, 68 F.3d 710, 732 (3rd Cir. 1995), 516 U.S. 1088 (1996) ("Flamer has not shown that he suffered any actual prejudice, for there is

no **reasonable probability** that he would not have been convicted even if Reardon had presented a dazzling closing argument"); *Barnes v. Thompson*, 58 F.3d 971, 980 (4th Cir. 1995), *cert. denied*, 516 U.S. 972 ("even if Barnes were unable to show that El-Amin should have presented the evidence of abuse and disfunction, it is **unlikely** that he could have satisfied *Strickland's* second requirement of a '**reasonable probability**' that the outcome would have been different but for El-Amin's failure to develop this case in mitigation"); *Clozza v. Murray*, 913 F.2d 1092, 1103 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991) ("Having examined the evidence, Clozza contends should have been submitted, we are not left with the conclusion that there is a **reasonable probability** the result would have been different if the evidence had been presented") (emphasis added in all cases).

The Court of Appeals applied the proper standard to determine prejudice. The State's dissatisfaction with the result is not sufficient grounds for review.

CONCLUSION

The Court of Appeals properly applied well-established rules of law in deciding this case. The state court's finding on *Strickland's* "prejudice" prong is a mixed question of law and fact, and the Court of Appeals was correct in according it no presumption of correctness. In addressing that issue, the Court of Appeals applied the proper standard of whether there is a "reasonable probability" that the ineffectiveness of counsel affected the sentence.

The State's theories would misconstrue *Strickland* and trivialize the process of capital sentencing review.

For all the foregoing reasons, Respondent, Bernard Smith, respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

James M. Ackerman
Counsel of Record

David B. Earl
Jennings, Strouss &
Salmon, P.L.C.
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2393
(602) 262-5982
Attorneys for Respondent